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5 IN THE UNITED STATES DISTRICT COURT  
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7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 TODD ASHKER and DANNY TROXELL,

No. 05-03286 CW

9 Plaintiffs,

ORDER DENYING  
PLAINTIFFS'  
MOTION FOR LEAVE  
TO FILE MOTION  
FOR  
RECONSIDERATION

10 v.

11 ARNOLD SCHWARZENEGGER, et al.,

12 Defendants.

13 \_\_\_\_\_/14  
15 Plaintiffs Todd Ashker and Danny Troxell move for leave to  
16 file a motion for reconsideration of the portion of the Court's  
17 March 25, 2009 Order Granting, in Part, Defendants' Motion for  
18 Summary Judgment and Denying Plaintiffs' Cross-Motion For Summary  
19 Judgment which denied Plaintiffs' due process claim arising from  
20 the validation of Plaintiffs as members of the Aryan Brotherhood  
21 prison gang.<sup>1</sup> Defendants oppose the motion. The matter was taken  
22 under submission and decided on the papers. Having considered all  
23 the papers filed by the parties, the Court denies Plaintiffs'  
24 motion.

25 Civil Local Rule 7-9(a) states as follows: "No party may

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27 \_\_\_\_\_  
28 <sup>1</sup>Mr. Troxell's claim was barred by the statute of limitations.  
Plaintiffs do not move for reconsideration of this part of the  
Order.

1 notice a motion for reconsideration without first obtaining leave  
2 of Court to file the motion." A request for leave to file a motion  
3 for reconsideration may only be granted if the moving party shows:

4 (1) That at the time of the motion for leave, a material  
5 difference in fact or law exists from that which was presented  
6 to the Court before entry of the interlocutory order for which  
7 reconsideration is sought. The party also must show that in  
8 the exercise of reasonable diligence the party applying for  
9 reconsideration did not know such fact or law at the time of  
the interlocutory order; or (2) The emergence of new material  
facts or change of law occurring after the time of such order;  
or (3) A manifest failure by the Court to consider material  
facts or dispositive legal arguments which were presented to  
the Court before such interlocutory order.

10 Civil L.R. 7-9(b).

11 No motion for leave to file a motion for reconsideration  
12 may repeat any oral or written argument made by the  
13 applying party in support of or in opposition to the  
interlocutory order which the party now seeks to have  
reconsidered.

14 Civil L.R. 7-9(c).

15 Plaintiffs argue that reconsideration is proper under Local  
16 Rule 7-9(a)(2) because a new material fact has emerged which was  
17 not available at the time the Court ruled on the motions for  
18 summary judgment. Plaintiffs refer to the March 30, 2009 Findings  
19 of Fact and Conclusions of Law issued after a bench trial by  
20 another judge of this Court in Lira v. Cate, C 00-0905 SI, which  
21 addressed that plaintiff's validation as a gang member.

22 Contrary to Plaintiffs' argument, the findings of fact and  
23 conclusions of law in another district court case do not constitute  
24 new evidence in this case. Furthermore, the circumstances of the  
25 plaintiff in Lira v. Cate are factually different from Mr. Ashker's  
26 circumstances; Lira was not given the opportunity to meet with the  
27 Institutional Gang Investigator (IGI) regarding his validation as a

1 gang member, whereas Mr. Ashker refused to participate in  
2 interviews with the IGI. Also, this Court has carefully reviewed  
3 the evidence submitted in this case, including confidential  
4 memoranda submitted under seal for the Court's in camera review,  
5 and has found that it meets the "some evidence" standard supporting  
6 Mr. Ashker's continued gang validation. In Lira, the Court found  
7 that none of the evidence met the "some evidence" standard.

8 In addition to proffering Lira as new evidence, Plaintiffs'  
9 motion merely attempts to relitigate the arguments they made in  
10 their cross-motion for summary judgment. This is not allowed  
11 pursuant to Local Rule 7-9(c).

12 Therefore, Plaintiffs' request for leave to file a motion for  
13 reconsideration (docket # 382) is denied.

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15 IT IS SO ORDERED.

16  
17 Dated: May 28, 2010

  
18 CLAUDIA WILKEN  
United States District Judge

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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

ASHKER ET AL et al,

Plaintiff,

Case Number: CV05-03286 CW

V.

SCHWARZENEGGER ET AL. et al.

Defendant.

## **CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

11 That on May 28, 2010, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies)  
12 in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in  
the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's  
office.

15 Danny Troxell B-76578  
Pelican Bay State Prison  
16 P.O. Box 7500, C-8-101  
Crescent City, CA 95531

17 Todd Ashker C-58191  
18 Pelican Bay State Prison  
19 P.O. Box 7500, D1-119  
Crescent City, CA 95531

20 | Dated: May 28, 2010

Richard W. Winking, Clerk  
By: Ronnie Hersler, Administrative Law Clerk